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In The

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
For the Ninth Circuit

AMICI CURIAE BRIEF OF STATES OF FLORIDA, ALASKA, CONNECTICUT, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN, AND WYOMING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

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MISCELLANEOUS

"Gambling on Indian Reservations and Lands," *Hearing before the Select Committee on Indian Affairs, U. S. Senate, on S. 902*, 99th Cong., 1st Sess. 140, 143, 144, 145-146 (1985) (testimony of Deputy Assistant Attorney General Mark M. Richard) 15

STATEMENT OF INTEREST

The amici states have a significant interest in the issues presented here. All amici states have Indian lands located within their borders.[1] On some Indian lands, Indian tribes are conducting high stakes gambling operations, or have indicated an intention to do so. On other Indian lands, it is expected that Indian tribes may initiate gambling operations because of the increasingly popular nature of this form of activity as a means of raising tribal revenue. As of 1985, at least 100 tribal gambling operations were in effect in 19 states. Jurisdictional Statement ("JS"), 4. Given the increased prevalence of the activity, the present figure is probably much higher.

Most tribal gambling operations consist of high stakes bingo. Typically, the tribe hires a non-Indian professional operator to conduct the games, who receives a percentage of the profits. The jackpots are often very large, frequently consisting of cars or cash awards of thousands of dollars. The games attract, and are intended to attract, non-Indians who reside off the reservation and who cannot lawfully play high stakes bingo elsewhere in the state. Indeed, hundreds of non-Indians typically play the games each night. The games would not be financially profitable if they did not attract non-Indians.

The Ninth Circuit decision impairs the states' legitimate interest in preventing high stakes commercial gambling. The commercial games potentially attract organized criminal elements because they feature high stakes and are not regulated by the federal government. The

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[1]In Ohio, there are no Indian reservations, but one Indian tribe is seeking federal recognition for purposes of conducting bingo operations.

Ninth Circuit held that Indian tribes have a sovereign right to conduct the games even though the games violate state law and are profitable only because they attract non-Indian patrons. Significantly, the Ninth Circuit held that federal law does not preempt state gambling laws as applied on Indian reservations. JS App. 7. Instead, the court held that Indian tribes have a sovereign right to play the games. *Id.* at 7-11. In holding that Indian tribes have a sovereign right, the court did not determine whether commercial gambling is a "traditional" form of tribal activity. Instead, the court ruled that Indian tribes have a sovereign right to raise revenue, and that the tribal revenue-raising interest outweighs legitimate state regulatory interests. *Id.* at 10-11.

The Ninth Circuit decision is not consistent with this Court's recent decisions concerning state jurisdiction over Indian reservations. This Court has never held that tribal revenue-raising interests outweigh legitimate state regulatory interests, particularly where the tribal activity depends on non-Indian patronage and where federal law does not preempt state law. To the contrary, this Court has held that Indian tribes do not have a sovereign right to engage in commercial intercourse with non-Indians in violation of state law. See *Rice v. Rehner,* 463 U.S. 713 (1983); *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134 (1980). Accordingly, this Court should grant review to properly weigh and consider state, federal, and tribal interests. A proper balance, it is submitted, supports the state's right to apply its gambling laws on Indian reservations here.

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REASONS FOR GRANTING PLENARY REVIEW

I. THE COURT OF APPEALS DECISION IMPROPERLY BALANCES STATE, FEDERAL, AND TRIBAL INTERESTS RELEVANT TO INDIAN COMMERCIAL GAMBLING.

Federal Indian law has evolved from the early day when this Court held, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), that Indian reservations are analogous to foreign nations whose boundaries are impenetrable by state laws. Today, the Court takes a more flexible view of state and tribal relationships. Under the modern view, state laws are applicable on Indian reservations unless they are preempted by federal law or infringe on tribal sovereignty. See, *e.g.*, *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-75 (1962). Increasingly, the focus is on federal preemption rather than tribal sovereignty. "The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards reliance on federal preemption." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues, . . ., but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172; see also *Rice*, 463 U.S. at 718.

The preemption analysis in Indian law is different than the preemption analysis in other contexts. "The unique historical origins of tribal sovereignty render ordinary preemption analysis unhelpful in Indian law cases." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,

143 (1980). In undertaking the preemption analysis, the Court instead balances state, federal, and tribal interests. The question turns on a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." *Id.* at 145.

In *Rice v. Rehner, supra,* 463 U.S. 713, this Court held that the tribal "tradition" is highly relevant in balancing state, federal, and tribal interests. If a sovereign tribal tradition exists, state laws cannot be applied unless Congress clearly authorizes their application, or unless the balancing of competing interests otherwise supports the application of state law. *Rice,* 463 U.S. at 719, 720. If, however, a sovereign tribal tradition does not exist, the "backdrop" of tribal sovereignty is accorded "less weight." *Id.*

The Ninth Circuit below properly held that the balancing test, or "particularized inquiry" test, is a form of "federal common law" because it is a judicial doctrine rather than a constitutional or statutory one. JS App. 6, & n. 6. Therefore, Congress can "preempt" or displace the common law balancing test by enacting legislation defining state jurisdiction over Indian reservations. Cf. *Milwaukee v. Illinois,* 451 U.S. 304, 313-314 (1981) (holding that Congress has displaced federal common law of nuisance by enacting Clean Water Act). The federal common law applies only in a "few and restricted instances" where Congress has not legislated and where the application of state law would impair an important federal interest or policy. *Milwaukee,* 451 U.S. at 313-314. The Ninth Circuit held that Congress has not preempted state gambling laws on Indian reservations, or otherwise indicated wheth-

er they apply, and thus that the federal common law applies here. JS App. 6-7, & n. 6.

In applying the common law balancing test, however, the Ninth Circuit failed to follow the guidelines established by this Court, most notably in *Rice*. The Ninth Circuit improperly expanded tribal sovereignty by defining it in economic terms rather than in terms of Indian conduct, and by holding that Indian tribes can take commercial advantage of state gambling prohibitions by marketing to non-Indians the very product that is prohibited. This Court has never suggested such an expansive interpretation of tribal sovereignty. The Ninth Circuit decision skews a proper balance and accommodation of state, federal, and tribal interests, and this Court should grant review to properly weigh such interests.

A. The Tribal Interest.

The Ninth Circuit improperly considered tribal interests in several major respects. First, the Ninth Circuit acknowledged that federal law does not preempt state gambling laws. JS App. 7. This case is thus different from other Indian law cases where state laws have been invalidated on preemption grounds. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. 136; *McClanahan v. Arizona State Tax Comm'n*, *supra*, 411 U.S 164. Instead, the Ninth Circuit held that Indian tribes have an "inherent sovereign right" to conduct gambling operations in violation of state laws. JS App. 9-11. The court thus rested its decision on tribal sovereignty grounds, not preemption grounds. This result departs from the modern "trend" away from tribal sovereignty and towards federal preemption as a bar to state jurisdiction over Indian

reservations, under which tribal sovereignty provides a "backdrop" for the preemption analysis. See, *e.g.*, *Rice*, 463 U.S. at 718.

Further, in holding that Indian tribes have a sovereign right to conduct gambling operations even where federal law does not preempt state law, the Ninth Circuit failed to consider whether Indian commercial gambling is a "traditional" form of tribal activity. Indeed, the Ninth Circuit ruled that the inquiry was irrelevant. JS App. 11. The court ruled instead that Indian tribes have a "sovereign" right to "raise revenue," and that the tribal revenue-raising interest "outweighs" the state's regulatory interest. *Id.* at 10-11. In effect, the court held that the tribal revenue-raising interest is sufficient regardless of the means by which the revenue is raised. The court considered tribal sovereignty solely in economic terms rather than in terms of Indian conduct. This approach fails to consider whether the tribal *activity* itself is linked to historical culture and customs, an inquiry that is most relevant in balancing state and tribal interests. The Ninth Circuit approach would apparently sanction any form of tribal commercial activity that raises revenue, even where the activity is clearly outside the tribal tradition.

The Ninth Circuit decision is inconsistent with this Court's recent decision in *Rice*, which holds that the tribal "tradition"—as determined by the tribal activity—is highly relevant in balancing state and tribal interests. 463 U.S. at 720-725. It is clear that Indian tribes have not *traditionally* conducted high stakes gambling operations for the benefit of non-Indians, particularly where the operations violate state laws. Such operations are not indige-

nous to the tribal culture, nor tied to historical custom or practice. Thus, the Ninth Circuit failed to undertake the inquiry that, according to *Rice,* is *the* most important inquiry in determining state and tribal relationships.

Additionally, the Ninth Circuit failed to properly consider that the tribal activity here involves non-Indians, in that the games are "predominantly" played by non-Indians. JS App. 2. This Court has held in recent cases that Indian tribes do not have a "vested right" to make sales to non-Indians, and that principles of tribal sovereignty do not support their right to make such sales. See *Rice,* 463 U.S. at 721 n. 7, quoting from *Washington v. Confederated Tribes of the Colville Reservation (Colville),* 447 U.S. 134, 151, & n. 27 (1980). It is one thing when Indian tribes develop reservation resources by means that do not depend on non-Indian involvement. It is entirely different when Indian tribes embark on commercial ventures that solicit and depend on non-Indian patronage. The state interest is strongest, and the tribal interest weakes, in the latter situation.

Finally, and most importantly, the Ninth Circuit failed to consider that the tribal gambling operations, beyond depending on non-Indian patronage, are profitable primarily because they are illegal under state law. The tribal games afford non-Indians a product—high stakes bingo—that they cannot lawfully obtain elsewhere in the state. Certainly the hundreds of non-Indians who travel to the reservations each night to play the games would take their patronage to other, more local establishments if the state legalized high stakes bingo throughout the state. Thus, the tribes are taking commercial advantage

of state gambling prohibitions by marketing to non-Indians the very product that is prohibited. The state, by prohibiting the product, has created the very market that the tribes seek to exploit. The situation would be different if the tribal games were able to succeed on their own merits, independently of state gambling restrictions. Such is not the case, however. The Ninth Circuit's decision thus conflicts with this Court's decision in *Colville, supra,* 447 U.S. 134, which holds that Indian tribes cannot "market an exemption" from state laws to non-Indians, particularly where the market exists only because of state restrictions against non-Indians. 447 U.S. at 155, 157.

It is thus clear that the Ninth Circuit decision expands tribal sovereignty beyond limits ever recognized by this Court, and indeed beyond any proper accommodation of state and tribal interests. The decision allows Indian tribes to market a product—high stakes bingo—to non-Indians in violation of state law, even though state gambling prohibitions have created the market and even though federal law does not preempt state law. The Ninth Circuit, unable to rest its decision on preemption grounds, instead held that Indian tribes have a "sovereign" right to raise revenue—regardless of the form of activity by which the revenue is raised—and that tribal revenue-raising interests outweigh legitimate state regulatory interests. The Ninth Circuit decision simply departs from modern federal Indian jurisprudence, and is more akin to the now discredited *Worcester* principle that state laws cannot be applied on Indian reservations under any circumstances. The decision is not consistent with the "accommodation" of state, federal, and tribal interests that

underlies modern federal Indian law. See *Rice,* 463 U.S. at 719.

A sounder analysis of the issues presented here is found in *Penobscot Nation v. Stilphen,* 461 A.2d 478 (Me. Sup. Jud. Ct.), *appeal dismissed,* 464 U.S. 923 (1983), and *Oklahoma v. Seneca-Cayuga Tribe,* 711 P.2d 77 (Okla. Sup. Ct. 1985), both of which hold that state laws prohibiting commercial gambling apply to tribal bingo operations. In *Penobscot,* the Maine Court held that, under the balancing test, state interests outweigh tribal interests because the Indian tribes are attempting to "market an exemption" from state laws to non-Indians, and the tribes would have "nothing to 'sell' " if the state did not prohibit high stakes bingo. 461 A.2d at 482-487. The Court also held that commercial gambling activities have played no part in tribal "historical culture and development." *Id.* at 490. The Oklahoma Supreme Court followed a similar analysis in holding that the State of Oklahoma has the right to prohibit tribal bingo games. *Seneca-Cayuga, supra,* 711 P.2d 77. According to the Oklahoma Court, "no one would deny that states have a legitimate interest in preventing infiltration of organized crime and in protecting the State's overall economy and tax base." 711 P.2d at 91 (emphasis added). The tribes, the Court stated, are to be encouraged in economic development, "but not at the expense of the states in which they reside and in disregard of those laws that protect both Indian and non-Indian citizens." *Id.* The Maine and Oklahoma decisions, it is submitted, reflect the "accommodation" of state, federal, and tribal interests that underlies modern federal Indian law. See *Rice,* 463 U.S. at 719.

The Ninth Circuit decision, although primarily focusing on tribal bingo operations, is not confined to this form of gambling activity. The decision also applies to the Riverside County ordinance prohibiting card parlor games. JS App. 2 n. 1. The Ninth Circuit stated that it found "no basis upon which to distinguish" these two forms of gambling. *Id.* If there is no basis for distinguishing the two gambling activities involved here, there may be no basis for distinguishing other forms of gambling as well. Thus, the Ninth Circuit decision appears to legitimize *any* form of tribal gambling activity, and thus transcends the bingo context primarily involved here.

B. The State Interest.

As noted above, the state interest arises because the tribal gambling operations cater to non-Indian patrons who cannot lawfully play high stakes bingo elsewhere in the state. The operations take commercial advantage of state gambling restrictions against non-Indians. The state interest, according to this Court. is entitled to greatest deference where the tribal activity involves non-Indians *Rice,* 463 U.S. at 720-721, & n. 7.

The state also has an interest in preventing organized criminal elements from gaining control of the tribal games. The possibility of criminal infiltration is real and substantial, because the high stakes that attract non-Indian patrons also attract organized crime. The federal government does not regulate or control the games. The combination of high stakes and lack of regulation creates a risk of organized criminal infiltration.

The U. S. Department of Justice recently testified before a congressional committee that Indian tribes lack the

law enforcement capability to ensure that high stakes bingo operations are not controlled by organized crime. According to the Department of Justice testimony:

> "The attraction that high stakes gambling has for criminal elements should be readily apparent. . . . It involves a large number of fast moving cash transactions. The opportunities for 'skimming' and 'laundering' are enormous. Employees and managers can be corrupted into dishonest manipulations. Large-scale gambling operations require significant support services, such as security, food, cleaning, sanitation and transportation. Every one of these fringe operations can be lucrative and can attract racketeers who preserve their competitive edge by violence and intimidation. . . .
>
> * * *
>
> "*Although the tribes are recognized as governments, they do not have the authority or resources to police these types of activities. The 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players. . . .*
>
> * * *
>
> "The Interior Department is in no position to assume the needed regulatory role, which in many respects, would be inconsistent with its mission and function." See "Gambling on Indian Reservations and Lands." *Hearing Before the Select Committee on Indian Affairs, U. S. Senate, on S. 902,* 99th Cong., 1st Sess. 140, 143, 144 (1985) (testimony of Deputy Assistant Attorney General Mark M. Richard) (emphasis added).

The Ninth Circuit held that the state interest is "weak" because there is "no evidence" that the tribal games here are controlled by organized crime. JS App. 8. The state interest in preventing organized criminal infiltration, however, exists apart from whether a particu-

lar operation is controlled by organized crime. The state interest lies in *preventing* criminal infiltration, not simply *correcting* the problem after it has taken root. It is easier for a state to prevent organized criminal control before it has become an accomplished fact. The practical reality is that the state often cannot detect an organized criminal operation unless it can screen operators, audit books, and exert the full force of its law enforcement apparatus. The Ninth Circuit decision prevents all such forms of state action.

The Ninth Circuit also held that the state interest is "weak" because state gambling laws are applied to Indian "operations" rather than non-Indian participation. JS App. 8. The distinction between operation and participation is one of form rather than substance, because regulation of either has the same effect on the tribal activity. The states apply their laws to operators because the operators control the games, and hence are most likely to be controlled by organized crime. Moreover, it is difficult to regulate participants, because it is not known whether a non-Indian exiting a reservation has participated in the gambling operation or not. In any event, the tribal activity involves non-Indians regardless of whether the state regulates operators or participants. For this reason, the Ninth Circuit's distinction between operators and participants is not relevant to the underlying state and tribal interests involved here.

C. The Federal Interest.

Congress has specifically provided that state gambling laws apply on Indian reservations. The Organized Crime Control Act (OCCA), 84 Stat. 937 (1970), 18 U.S.C. § 1955,

prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." The OCCA expresses a federal policy in support of state jurisdiction over Indian gambling operations. To be sure, current federal Indian policy, as expressed in President Reagan's policy statement and other federal laws, also favors tribal economic development. JS App. 8. Nothing in federal policy, however, suggests that this laudable goal is to be achieved by commercial gambling operations that violate the laws of the surrounding state, particularly where the gambling operations are successful *because* they violate state laws. Therefore, notwithstanding the general federal policy in favor of tribal economic development, federal policy *specifically* recognizes the states' authority to apply their gambling laws on federal lands, including Indian reservations.

The tribal activity here is bereft of the federal interest and involvement that has posed an obstacle to state jurisdiction over Indian reservations in other cases. In *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136, this Court held that Arizona lacked jurisdiction to apply its timber harvesting laws on Indian reservations because Congress had developed a "comprehensive" regulatory scheme, and because the Bureau of Indian Affairs was regulating on-reservation harvesting on a regular basis. 448 U.S. at 145-148. In *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983), this Court held that New Mexico lacked jurisdiction to regulate non-Indian fishing on an Indian reservation because the federal government and the tribe had carefully worked out their own regulatory program. Here, Congress has never enacted a statute or adopted a policy authorizing Indian commercial gambling.

and no federal agency or officer regulates, supervises, or monitors the games. The tribal activity here is purely unilateral.

II. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH STATE COURT DECISIONS HOLDING THAT STATE GAMBLING LAWS APPLY ON INDIAN RESERVATIONS.

As noted earlier, the highest courts of the States of Maine and Oklahoma have held that state gambling laws apply on Indian lands. See *Penobscot Nation v. Stilphen*, *supra*, 461 A.2d 478; *Oklahoma v. Seneca-Cayuga Tribe*, *supra*, 711 P.2d 77. Both courts, applying the common law balancing test, concluded that the balance of competing interests supports the application of state gambling laws on Indian lands. The Ninth Circuit decision here conflicts with both decisions, although neither is mentioned in its decision.

To be sure, the Fifth Circuit and the Ninth Circuit in an earlier decision held that Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1163, 28 U.S.C. § 1360, does not permit state gambling laws to be applied on Indian reservations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).[2] Both decisions, how-

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[2]Public Law 280 provides that, in California and several other states, "those *civil* laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory," and that "the *criminal* laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." JS App. 23-25 (emphasis added).

ever, were limited to the narrow question whether a federal statute—Public Law 280—permits state laws to be applied and neither decision applied the common law balancing test. Thus, both decisions are inapposite to the common law issue arising here. The Ninth Circuit decision is the only appellate decision holding that the common law balancing test does *not* permit state gambling laws to be applied on Indian reservations, and directly conflicts with the Maine and Oklahoma decisions in *Penobscot* and *Seneca-Cayuga,* which hold to the contrary. This Court should grant review to resolve this conflict.

This Court dismissed the tribal appeal from the Maine Court's decision in *Penobscot* "for want of a substantial federal question." 464 U.S. 923 (1983). Although a denial of certiorari, such as occurred in *Seminole* and *Barona,* does not constitute binding precedent, the dismissal of an appeal for want of a substantial federal question constitutes a disposition on the merits. *Hicks v. Miranda,* 422 U.S. 332, 345 (1975). For this reason, a representative of the U. S. Department of Justice, in recent congressional testimony, referred to *Penobscot* as "a recent Supreme Court decision," and stated that this Court's dismissal of the tribal appeal in that case "suggests that in such cases state regulatory law is applicable." See "Gambling on Indian Reservations and Lands," *Hearing before the Select Committee on Indian Affairs, U. S. Senate, on S. 902,* 99th Cong., 1st Sess. 145-146 (1985) (testimony of Deputy Assistant Attorney General Mark M. Richard). The Ninth Circuit decision thus conflicts with this Court's own decision in *Penobscot.*

III. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT THE BALANCING TEST RATHER THAN THE "CIVIL REGULATORY-CRIMINAL PROHIBITORY" TEST APPLIES IN DETERMINING WHETHER STATE REGULATORY LAWS APPLY ON INDIAN RESERVATIONS.

Turning to the Public Law 280 issue, the Ninth Circuit below followed the Fifth and Ninth Circuit decisions in *Seminole Tribe v. Butterworth, supra,* and *Barona Group v. Duffy, supra,* which hold that Public Law 280 does not authorize state and local governments to apply their gambling laws on Indian reservations. In *Seminole* and *Barona,* the courts fashioned a legal theory premised on this Court's ruling in a tax case, *Bryan v. Itasca County,* 426 U.S. 373 (1976). Under this theory, state "criminal prohibitory" laws can be applied on Indian reservations, but not state "civil regulatory" laws. Thus, state gambling laws can be applied on Indian reservations only if the state "prohibits" all gaming as a "criminal" matter, rather than "regulates" gaming by licensing it. In other words, in the absence of a *per se* prohibition of a particular activity, the law is necessary "civil regulatory" in nature. In *Seminole* and *Barona,* the Fifth and Ninth Circuits held that state gambling laws are "civil regulatory" and therefore not included under Public Law 280.

The "civil regulatory-criminal prohibitory" dichotomy is a highly mechanical standard that fails to consider the state's legitimate interest in regulating certain kinds of conduct. Indeed, the standard absolutely prohibits state regulation of conduct on Indian reservations, no matter how compelling the state interest or how tangential or re-

mote the tribal interest. The balancing test adopted in *Rice v. Rehner, supra*, on the other hand, accommodates legitimate state law enforcement and policy concerns by providing that such concerns must be weighed against tribal concerns. The general canon of construction that requires ambiguities in federal laws to be construed favorably to Indians, *e.g., Antoine v. Washington*, 420 U.S. 194, 199 (1975), provides sufficient protection of tribal interests, without additionally prohibiting state regulation of on-reservation conduct regardless of the legitimacy of the state interest. As noted earlier, the highest courts of the States of Maine and Oklahoma invoked the balancing test in holding that the states' interest in preventing organized criminal control outweighs the tribal interest in raising revenue, particularly where the tribal activity depends on non-Indian involvement and is not a traditional form of tribal activity. Therefore, it is submitted that the balancing test, not the "civil regulatory-criminal prohibitory" dichotomy, provides the proper accommodation and adjustment of state and tribal concerns here.

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CONCLUSION

The amici curiae states respectfully request that this Court note probable jurisdiction and grant plenary consideration.

Respectfully submitted,

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